No. 12347

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ALL AMERICAN AIRWAYS, INC.,

Appellee.

On Appeal From the United States District Court for the Southern District of California Central Division

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PETITION OF THE UNITED STATES FOR REHEARING.

THERON LAMAR CAUDLE,
Assistant Attorney General;

ELLIS N. SLACK,

HARRY MARSELLI,
Special Assistants to the Attorney General.

ERNEST A. TOLIN,
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UNITED STATES OF AMERICA,

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vs.

ALL AMERICAN AIRWAYS, INC.,

Appellee.

PETITION OF THE UNITED STATES FOR REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit and to the Judges Thereof:

Comes now the United States of America, the appellant in the above entitled cause, by its attorneys, and presents this, its petition for a rehearing in the above entitled cause in which a *per curiam* opinion and judgment were rendered by this Court on February 17, 1950, and in support thereof respectfully presents the following reasons:

That this Honorable Court has erroneously assumed that the judgment appealed from by the United States is a "consent judgment" and upon the basis of that erroneous assumption has erroneously concluded to affirm the judgment of the District Court

without considering the appeal of the United States on the merits; and that in the interests of justice and fairness this Court should therefore vacate and set aside its opinion and judgment and grant a rehearing, so that it may consider the appeal of the United States on the merits, upon the points urged and argument presented by the United States.

In support hereof, the United States respectfully shows the following:

1. The *per curiam* opinion of this Court, filed in this cause on February 17, 1950, shows that the decision of this Court to affirm the judgment of the court below rests exclusively upon the assumption made by this Court that this appeal is from a "consent judgment." We submit that that assumption is so clearly erroneous, so completely without support in the record, and so contrary to the terms of the stipulation [R. 13-14], by which the parties paved the way for the entry of judgment in the court below, and to the terms of the judgment itself [R. 14-16], as well as to the obvious intent of the parties, that it would be a shocking miscarriage of justice if this Court were to permit its opinion and judgment, heretofore rendered upon the basis of that assumption, to stand.

2. This is an action brought by the appellee under 28 U. S. C., Section 2410, to quiet title to certain airplanes against which the United States had asserted liens for unpaid federal taxes due from Northern Airlines, Inc., the former owner of the airplanes. [R. 2-10.] The defendant United States moved to dismiss the action upon

the ground that the complaint failed to state a claim against the United States upon which relief could be granted. [R. 11.]

In the view of the defendant United States, the complaint alleged all of the material facts,[1] which the United States was willing to admit, and it did admit them, for the purpose of the motion to dismiss. In the view of the United States, the action involved only one question, upon which its only defense to the action rested, namely, a question of law as to whether the Government's otherwise valid tax lien for unpaid federal taxes due from Northern Airlines (under Section 3670 of the Internal Revenue Code), notice of which had been filed (pursuant to Section 3672(a) of the Code), was valid with respect to airplanes against a subsequent purchaser even though the tax lien had not also been "recorded" with the Administrator of Civil Aeronautics.

The United States presented its defense by a motion to dismiss, in accordance with Rule 12(b)(6) of the Federal

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[1]The complaint even included allegations of fact expressly made upon information furnished by the United States [Pars. VII and VIII, R. 5-7], which in the complaint is referred to as "the defendant" [R. 2-3]. Actually, the complaint was prepared upon collaboration between counsel for the appellee and for the United States so as to leave no issue of fact and as to present the question of law involved in the action in such a manner that it could be raised by a motion to dismiss. See, in this connection, the affidavit (in support of this petition) of Eugene Harpole, Esquire, one of counsel for the United States in the court below, which affidavit is submitted herewith, as an appendix hereto, and by reference made a part hereof, and the Court is respectfully requested to consider it in support of this petition.

Rules of Civil Procedure.[2] The motion was accompanied by a "memorandum of points and authorities in support of the motion" [R. 11] filed by the United States.[3] In keeping with Rule 12(d) of the Federal Rules of Civil Procedure, the motion was heard by the court below at a preliminary hearing, after which the court denied the motion without prejudice, and granted the United States 20 days within which to answer. [R. 11-12.] After the trial court had decided against the United States the question of law in the case—which, as already stated, was the *only* question in the case—further proceedings in the trial court would have been useless, and the United States thereupon determined to stand on its motion and not plead further, but to bring the question to this Court on appeal.[4]

In view of the decision of the United States to stand on its motion and to appeal, the parties at that point by stipulation [R. 13-14] eliminated further useless proceedings in the trial court so as to pave the way for the prompt entry by the court below—without any further, unnecessary, useless steps—of a judgment in accordance with its ruling on the motion to dismiss, from which judgment it was understood the United States would appeal.

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[2]This is "substantially the same as the old demurrer for failure of a pleading to state a cause of action." (Note to Subdivision (b) of Rule 12, Advisory Committee's Report of Proposed Amendments to the Federal Rules of Civil Procedure, June, 1946.) Demurrers were abolished by Rule 7(c) of the Federal Rules of Civil Procedure, which in this respect were patterned after old Equity Rule 29, which had abolished demurrers and had provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or answer. (See paragraph 3 of Note to Subdivisions (b) and (d) of Rule 12, Advisory Committee's Notes to the Federal Rules of Civil Procedure, March, 1938.)

[3]Additional extensive briefs were filed by both sides in the court below on the strongly contested question of law.

[4]See affidavit of Eugene Harpole, Appendix, *infra*.

With further steps or useless formalities so dispensed with by the stipulation of the parties, the trial court thereupon entered its judgment [R. 14-16], and the United States took its appeal [R. 17-18], exactly as contemplated and as understood by both sides. Far from being a "consent judgment," as erroneously assumed by this Court in its *per curiam* opinion, the judgment entered by the court below was entered with the *prior* knowledge and understanding of *both* sides that the United States was not satisfied with the trial court's decision on the question of law in the case and that the United States would appeal.

3. The mechanics which the parties chose in the court below, for the purpose of giving effect to their intention to eliminate further useless proceedings in the trial court and to pave the way for the prompt entry of a judgment from which United States could prosecute its appeal, consisted of the stipulation. [R. 13-14.] Aside from disposing of the action as to the fictitiously named defendants, the stipulation does no more than state: (1) that the United States would not plead over, *i. e.,* that it would stand on its motion to dismiss; (2) that the appellee could apply forthwith for judgment, which was approved as to form; (3) that the three-day notice required by Rule 55(b)(2) of the Federal Rules of Civil Procedure was waived; and (4) that the judgment could be entered on the allegations of the complaint, without the introduction of evidence prescribed by Rule 55(e) of the Federal Rules of Civil Procedure.

We submit that a detailed analysis of the terms of the stipulation establishes beyond the possibility of any doubt that, other than as to form and as to the procedural requirements above indicated, there was no *consent* by the United States to a judgment against it. The first para-

graph merely announces that the United States would not plead over, while the second paragraph disposes of the fictitiously named defendants, and, quite obviously, no *consent* to a judgment could possibly be "interpreted" from either of those paragraphs. The statement in paragraph three that "plaintiff may apply forthwith for judgment in the form attached hereto marked Exhibit A" [R. 13] is clearly no more than an approval *as to the form of the judgment*,[5] and obviously no *consent* can be implied from that. The further statement in paragraph three of the stipulation, "that the judgment may be signed and entered by the court *ex parte* and without service of a three-day written notice as provided by Rule 55(b)(2), Federal Rules of Civil Procedure" [R. 13], is clearly only a waiver of that three-day notice,[6] and it would be palpably wrong to construe that language as amounting to a *consent* on the part of the United States to the entry of a judgment against it, we submit.

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[5]Obviously, the quoted provision was put in the stipulation as a compliance with the requirements of Rule 7(a) of the Rules of the court below which, in its material part, is as follows:

> All findings, conclusions of law, judgments and decrees * * * shall be prepared in writing by the attorney or attorneys for the successful party * * *. The counsel whose duty it is to prepare any such document shall submit a copy thereof to opposing counsel, who shall promptly (1) endorse on the original an approval, or (2) endorse a disapproval as to form * * *.

That the above quoted language of the stipulation was intended as compliance with this rule of the court below is demonstrated by the fact that no endorsement as to approval appears on the judgment itself. [R. 14-16.]

[6]The provision of Rule 55(b)(2) calling for the notice is as follows:

> If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. * * *

The fourth and last paragraph of the stipulation states that "the judgment may be signed and entered on the allegations in plaintiff's complaint without supporting evidence and without other or further compliance with rule 55(e), Federal Rules of Civil Procedure." [R. 14.] This, we submit, amounts to no more than a willingness on the part of the United States that the judgment be entered *on the allegations of the appellee's complaint, without the necessity of presenting the supporting evidence* which otherwise would be required by Rule 55(e) before a default judgment could be entered against the United States.[7] To imply a *consent* on the part of the United States to the entry of a judgment against it from paragraph four of the stipulation would require a bold disregard of the language used in the stipulation, and of the obvious intent and purpose of the stipulation in the light of the realities of the situation under which the stipulation was entered into. The United States had previously presented its only defense to the action by its motion to dismiss, under which it took the position that, admitting the facts alleged in the complaint as true, no relief could be granted as a matter of law. The trial court had denied the motion to dismiss, and the United States had decided to stand on its motion and to appeal and so, for the obvious purpose of eliminating further useless steps in the

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[7]Rule 55(e) provides as follows:

> (e) *Judgment Against the United States.* No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

This is substantially the same provision as was contained in the last clause of Section 763, 28 U. S. C. (action against the United States under the Tucker Act). (See note to Subdivision (e) of Rule 55, Advisory Committee's Notes to the Rules of Civil Procedure, March, 1938.)

trial court, the United States was willing to agree that the allegations of fact contained in the complaint could be taken as true and that *judgment could be entered upon them, without the necessity of having the supporting evidence introduced* as would be required by Rule 55(e). In other words, the real substance of paragraph four of the stipulation was that the United States agree that the facts pleaded in the complaint may be taken as true, and that the appellee need not establish them by proof as required by Rule 55(e).

The stipulation of the parties, when viewed in the light of the record, demonstrates unmistakably not that there was a "consent judgment" but that, after the trial court had made its decision on the question of law in the case, by its ruling on the motion to dismiss, the parties by agreement eliminated all further steps in the trial court, which would have been useless, and disposed of all procedural requirements and technicalities, so as to pave the way for the prompt entry of a judgment from which the United States could prosecute its appeal and bring the disputed question of law to this Court for decision. It would indeed be a shocking travesty on the administration of justice, we submit, if, after the United States through its attorneys had cooperated—and commendably, we feel,—with counsel for the appellee to eliminate further needless steps in the trial court so as to make possible the speedy entry of a judgment from which the United States could prosecute its appeal, this Court should deprive the United States of its right to appeal by an erroneous assumption that the judgment appealed from was a "consent judgment." It is clear from the record, we submit, that the litigation in the trial court was handled by counsel for both sides in keeping with the spirit of the Federal Rules of Civil Procedure, as stated in Rule 1, "to secure the

* * * speedy, and inexpensive determination of every action." Besides serving as a deterrent against such co-operation between counsel in the future, the decision of this Court in this case, if permitted to stand, would constitute an unjust and unwarranted deprivation of the right of the United States to appeal by erroneously assuming that the United States had *consented* to the judgment against it, whereas in fact it had merely agreed to the form of the judgment and agreed to do away with certain procedural requirements.

4. It is our position that the language of the stipulation itself establishes beyond any possible doubt that, aside from agreeing as to matters of form or procedure, the United States did not *consent* to the entry of a judgment against it. However, even if it were possible to entertain the slightest doubt under the stipulation—which we emphatically insist is impossible—such doubt would be readily dispelled by an analysis of the judgment itself. [R. 14-16.] It does not contain even the slightest suggestion that the judgment is a "consent judgment." The preliminary or opening paragraph of the judgment [R. 14-15] merely shows that the court is deciding the case after the United States, whose motion to dismiss had been denied, had declined to plead over—*i. e.,* was standing on its motion, just as a litigant would stand on his demurrer under the old practice.

5. Clearly, there is nothing in this record which could possibly support the conclusion that there was a consent—other than as to form and procedural requirements—on the part of the United States to the entry of a judgment against it. Unless there is a *real* consent, the rule relied upon by this Court in its *per curiam* opinion, to the effect that a consent judgment is not reversible, is clearly in-

applicable, as indeed implicity recognized by this Court in *United States v. Cushman,* 131 F. 2d 1021, in which it followed a similar holding in *Becker v. Anchor Realty & Investment Co.,* 71 F. 2d 355, 356 (C. A. 8th).

6. That there was no *real consent* on the part of the United States to the entry of judgment against it is clear beyond any doubt from the record, we believe. The only other thing which the United States could have done might have been to file some formal objection or exception to the judgment, but that, clearly, would have been futile and unnecessary. Rule 46 of the Federal Rules of Civil Procedure made formal exceptions unnecessary, it being provided in the Rule that it will be sufficient that a party make known to the court the action which he desires the court to take. See also *United States v. Barndollar & Crosbie,* 166 F. 2d 793, 796 (C. A. 10th).

In this case, the United States clearly and unmistakably made known to the court its position, or the action it desired the court to take: It filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and filed briefs (and argued orally before the court), arguing that as a matter of law the appellee was not entitled to relief because the lien of the United States for taxes was valid, when recorded in accordance with the provisions of the Internal Revenue Code, even though not "recorded" with the Administrator of Civil Aeronautics.

7. Finally, attention is invited to a further, and indeed quite significant, indication that the judgment appealed from was not a "consent" judgment. The appellee has at no time claimed that the judgment appealed from

was a "consent judgment"—neither in its brief, nor at the oral argument before the Court.[8]

Wherefore, in view of the foregoing, the United States respectfully requests that this, its petition for rehearing, be granted by this Honorable Court, and that the Court's *per curiam* opinion and judgment rendered and entered herein on February 17, 1950, be vacated and set aside and that a rehearing be granted and the appeal of the United States be considered on the merits.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General;
ELLIS N. SLACK,
HARRY MARSELLI,
Special Assistants to the Attorney General.

ERNEST A. TOLIN,
United States Attorney;
E. H. MITCHELL,
Assistant United States Attorney.

March 13, 1950.

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[8]No question as to whether the judgment appealed from might be a "consent judgment" was raised even by the Court at the oral argument. Aside from the merits of the appeal, the only query raised by the Court was as to whether Rule 55(e), requiring the submission of evidence before a default judgment can be entered against the United States, might not have to be complied with literally—as to which query counsel pointed out that, in substance, what had been done was the same as stipulating the facts in the case.

Certificate of Counsel.

The undersigned, attorneys for the United States of America, appellant in this cause, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

THERON LAMAR CAUDLE,
Assistant Attorney General;

ELLIS N. SLACK,
HARRY MARSELLI,
Special Assistants to the Attorney General.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL,
Assistant United States Attorney.

APPENDIX.

No. 12347

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Appellant, v. All American Airways, Inc., Appellee.

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING.

State of California, County of Los Angeles—ss:

Eugene Harpole, being first duly sworn, deposes and says: That he has been admitted to practice law in the State of Montana since June, 1922, and at all times since he has been engaged in the practice of law, and subsequently he has been admitted to the practice of law in the States of Washington and California and before the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Southern District of California; that he has been an attorney employed by the Bureau of Internal Revenue since 1929, assigned to the Los Angeles office since 1931, and that he has been a Special Assistant to the Chief Counsel of the Bureau of Internal Revenue at Los Angeles since 1938. In the latter capacity he was one of the attorneys for the United States in the above entitled case when it was before the District Court of the United States for the Southern District of California.

That Robert D. Scott, an attorney admitted to practice before the courts of the State of California and before the District Court of the United States for the Southern District of California, was also a special attorney of the Bureau of Internal Revenue and the affiant's assistant at

Los Angeles, California, during the time the above-entitled case was pending before the District Court; that on November 14, 1949, Robert D. Scott resigned his position as affiant's assistant with the expressed intent of going to Addis Ababa, Ethiopia, as an advisor to the government of that nation; that affiant is informed and believes and therefore states that Robert D. Scott is now and since on and before December 1, 1949, has been in Addis Ababa, Ethiopia, and can be located at the Ras Hotel in that city.

Before the action was instituted Milo V. Olson, attorney for the plaintiff, showed the affiant a copy of the proposed complaint and as a result of conferences changes were made in the complaint to conform the allegations of fact to what affiant knew the United States would admit as true facts. As a result of the collaboration between opposing counsel in the preparation of the complaint no issue of fact remained between the parties. Accordingly, after the complaint was filed affiant caused his assistant, Robert D. Scott, to prepare a motion to dismiss which it was thought would properly raise the issue of law on which the differences between the parties rested.

On May 16, 1949, the United States District Judge Weinberger denied the defendant's motion to dismiss without prejudice and allowed 20 days to answer; on May 17, 1949, affiant's office received a notice of the ruling from Milo V. Olson (a copy of which appears at pp. 12-13 of the printed transcript of record on appeal) accompanied by a letter of transmittal (a copy of which is attached hereto, marked Exhibit A, and incorporated herein by

reference); said letter clearly expresses the intent of affiant with respect to the ruling of Judge Weinberger and reflects an understanding arrived at between affiant, Robert D. Scott, E. H. Mitchell, the assistant in the office of the United States Attorney in active charge of the case, and Milo V. Olson in discussion between them prior to the filing of the motion to dismiss.

That on May 18, 1949, a letter to the Attorney General of the United States was dictated for the signature of the United States Attorney by Robert D. Scott, with affiant's approval, and actually sent to the Attorney General, concerning the order of Judge Weinberger denying defendant's motion to dismiss. The letter contained the following paragraphs:

> "Judge Weinberger on May 16, 1949, denied the Government's motion to dismiss the above entitled action, granting the defendant twenty days in which to answer or otherwise plead. Denial of the motion was without prejudice to a right to renew such motion later.
>
> * * * * * * * *
>
> "The complaint in this action was carefully worked out between counsel for the plaintiff and counsel for the Government; hence, it is believed that all material facts were properly alleged and that there would be no object in filing further pleadings or in having further trial. We recommend, therefore, (1) that we be authorized to permit judgment to be entered on the motion to dismiss, and (2) that an appeal be taken to the United States Court of Appeals for the Ninth Circuit on the ground that the Court erred in denying the Government's motion to dismiss."

On or about May 31, 1949, a teletype message was delivered to affiant's office, a copy of which is attached and marked Exhibit B and incorporated herein by reference. After the receipt of the teletype message a conference was held between the affiant, Robert D. Scott and Milo V. Olson in Mr. Scott's office, in which affiant pointed out that since it had been decided that the United States would stand upon its motion to dismiss he saw no objection in advising the District Court of that fact, namely, that the United States would file no further pleadings to plaintiff's complaint and that in order to expedite the ultimate decision in the case on appeal plaintiff need not wait the full 20 days allowed by Judge Weinberger's order of May 16, 1949, within which the defendant might answer, before applying for a judgment in its favor and that the United States would waive the requirements of Notice and Proof of the allegations of plaintiff's complaint which Rule 55(b)(2) and Rule 55(e) of the Federal Rules of Civil Procedure prescribe, and that the requirements of Rule 7(a) of the Rules of the District Court of the United States for the Southern District of California that judgments be approved as to form by counsel for the losing party could be taken care of in a stipulation.

At the close of this discussion Robert D. Scott was instructed to work out an acceptable stipulation with Milo V. Olson along the lines suggested. Within approximately 24 hours after the discussion Robert D. Scott brought the stipulation and judgment as they appear at pp. 13-16 of the printed transcript of record on appeal to affiant for

his consideration and approval. Affiant discussed the stipulation with Robert D. Scott and it was concluded between them that: (1) Since paragraph 1 of the stipulation advised the District Judge that the United States would not answer or further plead to plaintiff's complaint, the plaintiff might apply forthwith for a judgment under Judge Weinberger's order; (2) the judgment presented with the stipulation conformed to the ruling made in Judge Weinberger's order and was entitled to be approved as to form under Rule 7(a) of the District Court; (3) the provisions of Rule 55(b)(2) and (e) of the Rules of Civil Procedure requiring three-day written notice and proof of plaintiff's claim, although applicable, need not be complied with because counsel had fully collaborated in making the complaint accurate in its allegations and insistence on the letter of the rule would needlessly extend the time and labor of the litigation and needlessly enlarge the record.

As a result of the discussion the affiant signed the stipulation on behalf of the United States but (other than the approval contained in the stipulation) did not endorse "approval as to form" on the judgment, as required by Rule 7(a) of the District Court. The judgment presented to affiant with the stipulation did not recite that it was a consent judgment. Affiant had no authority or instructions in this case to consent to an entry of a judgment in plaintiff's favor and against the United States. Affiant at no time had any intention of consenting to a judgment in plaintiff's favor and against the United States; and affiant in signing the stipulation found at pp. 13 and 14

of the printed transcript of record on appeal intended not to consent to a judgment in the plaintiff's favor and against the United States, but to comply with Rule 7(a) of the Rules of the District Court and to waive if possible the requirements of Rule 55(b)(2) and (e) of the Rules of Civil Procedure, and in effect to agree that the allegations of fact in the complaint could be treated as true facts. That Affiant expressly told Milo V. Olson in the presence of Robert D. Scott, that Affiant would not and could not consent to the entry of a judgment against the United States but would merely approve the proposed judgment as to form and waive the procedural requirements just mentioned. Affiant has at all times understood the pending action to be one involving the collection of many thousands of dollars of assessed internal revenue taxes, and that it was a case of first impression, involving a seriously contested issue of law.

EUGENE HARPOLE,
Affiant.

Subscribed and Sworn to before me this 13 day of March, 1950.

(Seal) C. M. COMMINS,
Notary Public in and for Los Angeles County, California.

Exhibit A.

Stanley W. Guthrie
Hugh W. Darling
Edward S. Shattuck
Milo V. Olson
Arthur C. Jones, Jr.
George G. Gute

Trinity 8104

Law Offices
GUTHRIE, DARLING & SHATTUCK
737 Pacific Mutual Building
Los Angeles 14

May 16, 1949.

Mr. Eugene Harpole
Mr. Robert D. Scott
Bureau of Internal Revenue
1727 Federal Building
Los Angeles 12, California.

Gentlemen:

All American v. U. S.

Enclosed is a notice of ruling. I understand the defendant will not answer but will take an appeal.

Cordially,

MILO V. OLSON,
MILO V. OLSON,
of
GUTHRIE, DARLING & SHATTUCK.

MVO:r

Exhibit B.

TELETYPE UNIT
MAY 31 AM 8:19
PUBLIC BLDGS. ADM.
LOS ANGELES

T
402 LA WAY J-D

WASHINGTON DC 5-31-49 1114A

CARTER UNITED STATES ATTORNEY

LA

RE ALL AMERICAN AIRWAYS INC VERSUS UNITED STATES NUMBER 8860-WC YOUR REFERENCE EHM/EH/RDS/MRK LET JUDGMENT BE ENTERED ON GOVERNMENTS MOTION TO DISMISS. ADVICE CONCERNING ATTORNEY GENERALS DECISION ON QUESTION OF APPEAL WILL BE FORWARDED ON AN EARLY DATE.

CAUDLE ASSISTANT ATTORNEY GENERAL JUSTICE DEPARTMENT

8860-WC
RR 1116A